

Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Federal-State Joint Board on)
Universal Service;)
)
Petition of Smith Bagley, Inc.)
for Definition of Service Area)
within the study area of Century)
Tel of the Southwest, Inc.)
in the State of New Mexico)

CC Docket No 96-45

COMMENTS OF THE NEW MEXICO EXCHANGE CARRIER GROUP

The New Mexico Exchange Carrier Group ("NMECG"), through its attorney, hereby submits its comments in response to the Public Notice issued in the above-captioned proceeding released March 13, 2002.¹ The NMECG is a consortium of incumbent rural telephone companies operating within the state of New Mexico.² Each of the member companies serves very sparsely populated areas, and all provide services to customer bases of less than 15,000 lines within the state.

¹ Smith Bagley, Inc. Petitions to Redefine the "service area" of CenturyTel of the Southwest, Inc. in the State of New Mexico, *Public Notice*, DA 02-602 rel. Mar. 13, 2002. ("*Public Notice*").

² The NMECG's members are Baca Valley Telephone Co., Century Telephone Co., Navajo Communications Company, Dell Telephone Cooperative, ENMR Telephone Cooperative, La Jicarita Rural Telephone Cooperative, Peñasco Valley Telephone Cooperative, Roosevelt County Rural Telephone Cooperative, Tularosa Basin Telephone Company, Valley Telephone Cooperative, and Western New Mexico Telephone Company.

BACKGROUND

On February 19, 2002, the New Mexico Public Regulation Commission (“NMPRC”) issued an order designating Smith Bagley, Inc. (“SBI”) as an ETC for a service area which constitutes a portion of the study area of CenturyTel of the Southwest, Inc., a rural telephone company.³ The NMPRC designation is conditional upon confirmation of SBI’s service area designation by this Commission. SBI has petitioned the Commission for approval of a redefined Service Area, which is consistent with New Mexico Commission’s Final Order.

The NMPRC determined that it was in the public interest to adopt the service area which was eventually stipulated to because it believed that separating the discontinuous Pecos exchange from the rest of Century’s exchanges “will result in more accurate targeting of universal service support, by minimizing shortfalls or windfalls resulting from averaging cost across and [sic] economically diverse study area.”⁴ The NMPRC did not expect the decision to burden Century because it would only require Century to average its costs among the wire centers in the SBI service area, and that Century could later propose a “different disaggregation plan at a later date, more accurately targeting high cost funding.”⁵

³ In the Matter of Smith Bagley, Inc. for Designation as an Eligible Telecommunications Carrier under 47 U.S.C. 214 (e)(2). Final Order, Utility Case No. 3026, Feb. 21, 2002. The NMPRC essentially adopted the Aug. 14, 2001 *Recommended Decision of the Hearing Examiner and Certification of Stipulation*. (“*Recommended Decision*”)

⁴ *Recommended Decision* at 17.

⁵ *Recommended Decision* at 18.

In adopting a service area less than the Century study area, the NMPRC recognized that even with the changed boundary, SBI's FCC radio license did not authorize it to serve all of the people in the area. The NMPRC decided that this failure was not an impairment to ETC designation because "there is no rule requiring [the ETC boundary] to match exactly that of the incumbent LEC" and that "SBI has committed to use commercially reasonable efforts to provide service to those persons living in the areas...outside of its authorized FCC service area through resale of the A-side cellular carrier in those areas."⁶

The NMPRC proceedings considered the issue of how to determine when a SBI subscriber using the mobile capability of SBI's service should be properly considered to be obtaining service within the designated service area. SBI and the NMPRC staff filed a stipulation to the effect that at least 75% of the minutes included in its basic universal service ("BUS") offering plan must be used in the ETC service area.⁷ If a customer used more than 25% of its minutes outside of the ETC service area, after a series of notices the subscriber would be suspended from the BUS service, and the suspended BUS customers would not be included in SBI loop count reports to USAC. The NMPRC rejected this proposal.

DISCUSSION

1. The Commission Should Clarify That ETC Service Area Designation for less than the Study Area of a Rural Telephone Company Does Not Constitute Disaggregation of Universal Service Support.

⁶ *Recommended Decision* at 17. The Stipulation provided: "SBI agrees to use commercially reasonable efforts to attempt to arrange for the provision of wireless communications service through the A-Side cellular telephone carrier licensed to serve the area." *Recommended Decision*, Exhibit A1-2. Resale may be unavailable after November 24, 2002. See, 47 C.F.R. 20.12(b).

⁷ NMECG was a party to the case, but did not sign the stipulation.

The NMPRC Order appears to assume incorrectly that a state commission decision pursuant to Section 214(e)(5) of the Communications Act and Section 54.207(c) of the Commission's Rules has the effect of disaggregating the universal service support of the incumbent. To the contrary, disaggregation under the Commission's Rules occurs, if at all, only pursuant to the mechanisms adopted by the Commission in the *RTF Order* and *MAG Order* as set forth in Section 54.315.⁸ Under these rules, on or before May 15, 2002, Century will file its election to pursue one of the three paths provided, one of which includes an option not to disaggregate.

NMECG has no information as to which path Century may elect, but raises the issue now because the misunderstanding of the NMPRC, and possibly other state commissions, may substantially complicate both the disaggregation and ETC designation processes for NMECG members and other rural telephone companies. SBI is also apparently similarly confused with its statement to the Commission that "In order for SBI to be designated as an ETC in the area recommended by the PRC, the service area of CenturyTel must be disaggregated into smaller geographic areas."⁹

2. Without the incorrect conclusions regarding disaggregation, the NMPRC's Order does not provide substantial reasons for adopting a service area less than the entire study area of a Rural Telephone Company.

Section 54.207(c)(1)(ii) of the Commission's Rules requires a state commission to state its reasons for adopting a service area different from a rural telephone company's study area.

⁸ CITES

⁹ Smith Bagley, Inc., *Petition to Redefine Local Exchange Carrier Service Areas*, Mar. 1, 2002 ("Petition").

As discussed above, the NMPRC relied primarily on the incorrect assumption that designating a service area for SBI that is less than Century's study area would necessarily disaggregate the universal service support in the study area. With this reason removed, the Order is left with the bare statement that SBI's commitment to cover the "great majority" of Century's western exchanges satisfies any cream skimming concern, and the statement that Century's status as a rural carrier "will not be compromised by disaggregation."¹⁰

The statement that there will be no cream skimming is not explained in the conclusions and is not, by itself a rational conclusion. One cannot say that a second ETC is not skimming the cream of a study area on the basis of the second carrier's commitment to serve most of the *separated* area, for the cream may be entirely in that area and not at all in the area not served. The Order does not address this issue. The Hearing Examiner's summary of the testimony on the cream skimming issue says only that SBI's witness testified that the requested service area was based solely on SBI's intent to provide service to Native American communities and that SBI had invested \$600,000 to construct facilities.¹¹ While a service to Native Americans is a laudable goal, and investment is required to provide service, these statements are entirely irrelevant to whether the proposed service area is designed to , or will have, the effect of, skimming the cream from the incumbent's study area.

Since the question before the state commission and the FCC in a Section 214(e)(5) proceeding is the service area "throughout" which the second ETC must offer the supported services, a conclusion one way or the other has no implications for the incumbent's rural

¹⁰ *Recommended Decision* at 17-18.

¹¹ *Recommended Decision* at 13.

telephone company status or its Section 251(c) obligations. Thus the conclusion that Century's status will not be "compromised" provides no support for the public interest finding. Where the state commission has provided no basis for adopting a less than study area service area, there is no basis for this Commission to agree with the proposal.

3. The NMPRC Order fails to require SBI to provide service "throughout" the service area as a condition of ETCs designation.

As described in the Background section above, the NMPRC Order concluded that SBI could adequately serve the portion of the proposed service area outside its FCC licensed area through its commitment to "use *commercially reasonable efforts to attempt* to resell another cellular carrier's service. ETC designation requires provision of service "throughout" the designated service area, not commercially reasonable efforts to attempt to serve. Because the NMPRC Order is thus inconsistent with the Communications Act, this Commission cannot act to approve the proposed study area until the deficiency is corrected. The NMPRC designation of SBI's study area is also flawed in that it does not explicitly find that SBI will provide service "throughout" the study area as required by Section 214(e)(1). There is no recitation on the record as to whether SBI's cellular signal currently covers the entire proposed service area with a reliable signal.

4. SBI should be required to monitor subscriber usage and exclude from its loop counts those whose usage is not 75% within the designated service area.

SBI, to its credit, implicitly recognized during the state proceeding that receipt of universal support imposes a requirement that the support be used only for the facilities for which the support is intended. In this context that means that if mobile users with billing addresses in the designated service area spend a significant portion of their time outside the

designated area, the mobile carrier will receive support in violation of Section 254(e). Not only would out of area usage violate Section 254(e), but provision of support to mobile users based on the cost of a wireline carrier in a different location, exacerbates the disconnection between cost and support and will inevitably lead to either unjustified increases in the total fund, or inequitable allocation.

SBI thus proposed a 25% limit on such out of area usage. NMECG does not quarrel with the NMPRC rejection of the proposal to restrict the service of customers who exceed the 25% limit, because such restrictions are not necessary to comply with the requirements of the Act. NMECG does request, however, that if this Commission adopts the proposed service area, that it condition its approval on a requirement that SBI monitor subscriber usage and exclude from its report of "loops" to USAC any customer whose usage outside the designated area exceeds 25%.¹² By this request, NMECG does not necessarily agree that 25% is a proper measure, but because it is one that SBI has agreed to, it should have no grounds to object.

5. Prior to acting on this petition, the Commission should resolve the long pending issue of the requirement to provide "local usage" and find a better way to determine subscriber location than billing address.

While not directly related to the question of an appropriate service area, the pending Petition raises once again the issue that the Commission has yet to act on its 1997 promise to define how much local usage is required in order to meet the requirement to provide local usage. The combination of the windfall provided by the rules tying support for a wireless carrier to a wireline carrier's costs and the ability of wireless carriers to receive such support

¹² Section 54.307(b) of the Commission's Rules requires competitive ETCs to report working loops to USAC, but defines working loop by reference to Cable and Wire Facilities, terms that do not have specific meaning for mobile carriers.

without having to make the investment required to provide unlimited local calling is inconsistent with the Commission's adopted principle of competitive neutrality. As more such Petitions as this are filed, the issue will only become more and more serious.

Due to the mobility of wireless services, a billing address may have no bearing on where the service is used. Mobile wireless service by its very nature allows customers to use the service throughout large geographical areas that would include multiple service areas. There are substantial incentives for abuse in the Commission's rules which permit a wireless carrier to use a customer's billing address to determine the service area, and disaggregation zone in which the customer is located for the purpose of receiving high-cost support, without any safeguards.¹³ Adoption of a condition that out of service area use excludes the "loop" from the carriers loop count may be effective in controlling the problem in this case where the wireless carrier has suggested it can monitor usage, however the national problem remains unless further rulemaking is undertaken.

A rule limiting support to substantial in-service area usage does not solve the adverse incentives problem if there is not also an effective audit program to demonstrate that the rule is being followed.

CONCLUSION

The New Mexico Exchange Carrier Group requests that in acting on the Smith Bagley, Inc. Petition, the Commission clarify that designation of a service area for a second eligible telecommunications carrier in the area of a rural telephone company does not constitute

¹³ See, Coalition of Rural Telephone Companies, *Petition for Reconsideration and/or Clarification*, CC Docket Nos. 96-45, 00-256, Jul. 5, 2001, 3-6.

disaggregation of the universal service support of the rural company. With this correction, the New Mexico Public Regulatory Commission's approval of the proposed study area is left with little justification. Further, the Order fails to require Smith Baley to provide service "throughout" the service area. The NMECG requests that any approval by this Commission of the service area be conditioned upon a requirement that subscriber which use the service more than 25% out of the service area may not be included in the "loop" count reported to USAC. Finally, NMECG urges the Commission to resolve the long standing issues regarding the required amount of usage and determination of subscriber locations.

Respectfully submitted

New Mexico Exchange Carrier Group

By

A handwritten signature in black ink, appearing to read "David Cosson", written in a cursive style.

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